

AMERICA'S BENEFIT SPECIALIST

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Best Practices for Video Meetings

A Guide to COVID-19 Legislation

Candidates for NAHU's
Board of Trustees

COVID-19 LEGISLATION: A HELPFUL GUIDE

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As I write this article, I am, like most of you, confined to my home office, where I've been for a number of weeks during the pandemic. I'm fortunate as I'm perfectly healthy, as are all of my family and friends at this point but, of course, others have not been quite so lucky. All of our lives have been likely forever changed, from the way we greet people to the way we spend time with friends and relatives and the way we wonder about whether our finances will hold out during this pandemic.

Our new normal is Facetime and Zoom gatherings, virtual happy hours or chat sessions. We can be thankful for technology to allow us to stay somewhat connected but, for most of us, COVID-19 brought with it a longing to just be close to our loved ones. I think that with everything that has happened over the last few weeks and months, we now have a profound sense of longing for closeness and will cherish more than ever our friends and families.

Now it's time to get moving forward and to try to recover from the financial and

emotional devastation. Our businesses and those of our employer clients are required to offer federally required paid sick leave and expanded family medical leave under FFCRA. Although employers will receive tax credits, those will not be seen until the filing of next year's tax forms. The CARES Act will provide hopefully some relief, but the truth is most of us will look back at 2020 as one of the most financially and emotionally challenging years of our lifetimes.

My job is to attempt to break down for you, in as simple terms as possible, how to administer the complexities of the FFCRA and provide some basic guidance on the CARES Act. This is not an easy task, but I will do my best.

BACKGROUND

On the business side, employers are required to educate their workforce on

MOST OF US WILL LOOK BACK AT 2020 AS ONE OF THE MOST FINANCIALLY AND EMOTIONALLY CHALLENGING YEARS OF OUR LIFETIMES.

prevention of COVID-19. Under FFCRA, they are required to post notices about the FFCRA's leave rights for paid sick and extended family medical leave.

The IRS gave Americans tax relief by extending the deadline to file and pay for 2019 taxes until July 15, 2020. Other filing provisions, however, remain in place, such as the filing of ACA reporting forms (due March 31, 2020, if filing electronically). On April 24, President Trump signed the latest stimulus package, which allowed more funds for the Paycheck Protection Program to begin on April 27. On April 29, the IRS, DOL and other agencies released updated COBRA extensions and claims-filing rules related to COVID-19, which will be discussed later in this article.

BRIEF TIMELINE

Here is a brief timeline of events related to COVID-19, the FFCRA and the CARES Act:

Date	Actions
March 5	California CDI and DMHC puts health-coverage mandate into effect
March 18	FFCRA signed into law and health coverage mandate goes into effect; includes emergency FMLA and paid sick leave provisions, free testing for coronavirus, increased funding for unemployment insurance, food aid and Medicaid
March 24	FFCRA: DOL issues guidance on paid sick leave and FMLA expansion
March 25	FFCRA: DOL issues paid sick leave poster and Q&A
March 27	CARES Act signed into law; announcement of Economic Injury Disaster Loans (EIDL) and Paycheck Protection Program Loans through June 30
April 1	FFCRA: FMLA expansion, paid sick leave, and tax credits go into effect
April 1	FFCRA: DOL to issue guidelines on calculation of paid sick leave
April 3	Launch of Paycheck Protection Program
April 4-6	Major banks announce their PPP access is closed -- can't accept more
April 16	SBA Announces PPP Loans were closed; funds exhausted
April 24	President Trump signs latest \$484 billion federal stimulus bill, which includes \$310 billion in funding for additional PPP loans, \$75 billion for hospitals, \$25 billion for coronavirus testing ad \$60 billion for loans and grants for the SBA's disaster-relief resources
April 27	SBA PPP "re-starts," accepting new applications for the program
April 29	IRS, DOL and other federal agencies release updated COBRA extensions and claims-filing rules due to COVID-19, to be posted in Federal Register on May 4

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The first actions of the FFCRA was to provide coronavirus testing with no cost sharing for both fully insured and self-funded health plans, including grandfathered plans. It seems hard to believe that here in California those mandates started only on March 5.

In a very short amount of time, we were flooded with regulations and guidance and, for a couple of weeks, we were getting literally hourly, not just daily or weekly, updates and additional guidance. It was a crazy time and I could barely keep up. My hats off to the regulators, however, as they did an amazing job getting us all information in a very short amount of time. I honestly don't know how they did it so quickly.

Since March 18, when FFCRA was signed into law, a large number of releases were put out by the IRS/Treasury, DOL, HHS and other federal and state agencies to assist

employers in understanding and implementing FFCRA. The employer provisions are very complicated because they overlap and provide additional requirements for paid sick leave and FMLA, in addition to current laws.

WORKING WITH EXISTING LAWS

It's important to understand that the FFCRA does not replace existing federal or state laws; it exists in addition to them, or alongside them. FMLA/CFRA, California Paid Sick Leave and California's Leave for Participation in School Activities laws are still in place. Existing wage-replacement laws and insurance laws are still available, including California Paid Sick Leave, Paid Family Leave, State Disability Insurance, short-term disability, unemployment insurance and Workers Compensation still exist and must be administered. To assist with the confusion, the Department of Labor put together a good chart, which can be found at www.labor.ca.gov/coronavirus2019/#chart.

EMPLOYER SIZE IMPLICATIONS

Under the FFCRA, the paid sick leave and extended FMLA rules apply to employers with between one and 500 employees, and to public employers of any size. If an employer has over 500 employees, it is waived from the FFCRA paid sick leave and paid FMLA leave provisions. However, employers can always be more generous than the law requires. There is also a possible exemption for employers with less than 50 employees, if they can demonstrate "jeopardy to the viability of the business as a going concern." Employers are asked to document how and why this would jeopardize the business, and review the DOL's Wage & Hour Questions and Answers, which is continually updated. They are asking that employers DO NOT send any materials to the DOL. The Q&A, along with a fact sheet for employers and employees, can be found at www.dol.gov/newsroom/releases/whd/whd20200324.

SIX MOST IMPORTANT FACTORS RELATED TO PAID LEAVES

Under the FFCRA, the federal government for the first time requires paid leaves. The six important factors related to the leaves are spelled out below.

If an employee is unable to work or telework, the employer must provide paid sick leave due to a need for leave because:

- 1) The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
- 2) The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
- 3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- 4) The employee is caring for an individual who is subject to an order as described in subparagraph 1 or has been advised as described in paragraph 2.

5) The employee is caring for a son/daughter if the school or place of care of the son/daughter has been closed, or the child care provider of such son/daughter is unavailable due to COVID-19 precautions.

6) The employee is experiencing any other substantially similar condition specified by the secretaries of HHS, Treasury and Labor.

Items 1-3 are paid at 100% full pay. Items 4-6 are paid at two-thirds pay. There is an exemption for an employer of an employee who is a healthcare provider or an emergency responder.

FFCRA paid sick leave is effective on April 1 and sunsets (expires) on December 31, 2020. It's not retroactive, so if an employee went on leave prior to April 1, he is not subject to FFCRA. The amount of pay for items 1, 2 and 3 is based on the regular rate of pay, and items 4, 5 and 6 are based on two-thirds of the regular rate of pay. The

maximums are \$511/day and \$5,110 in the aggregate for 1, 2 or 3, and \$200 per day and \$2,000 in the aggregate for items 4, 5 and 6. Employers are required to pay up to 10 days, or 80 hours for full time, and, for part-time, the average they worked over two weeks.

HOW PAID SICK TIME IS CALCULATED

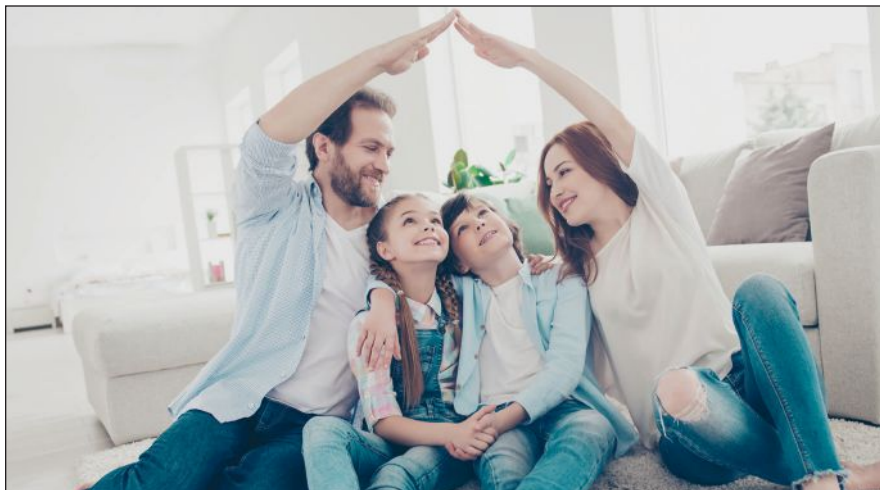
As a simple example, if the employee is paid \$21 per hour, the amount paid is $80 \times \$21 = \$1,680$, and if the employee is paid the same rate and is entitled to two-thirds of pay, the amount paid is $80 \times \$14 = \$1,120$ (\$14 is 2/3 of \$21). If someone has 40 hours of PTO booked, you cannot require them to take that PTO time first. If someone has zero hours of regular PTO booked, they can still take up to 80 hours for FFCRA.

For the full rate or two-thirds of rate, employees will receive for each applicable hour the greater of their regular rate of pay (last six months), the federal minimum wage in effect under the FLSA or the applicable state or local minimum wage. Their regular rate of pay includes commissions, tips and piece rates.

EXPANDED FMLA

Expanded FMLA is effective April 1 through December 31 for employers with one to 500 employees. For such expansion, FMLA is amended to add a new basis for up to 12 weeks of leave because of a "qualifying need related to a public health emergency," which means the "employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency." An eligible employee must have worked for the employer for at least 30 days prior to the effective date of FFCRA (or March 2).

The first 10 days of the leave is unpaid (the elimination period). During this time, employees may take their accrued sick,



FMLA IS AMENDED TO ADD A NEW BASIS FOR UP TO 12 WEEKS OF LEAVE BECAUSE OF A "QUALIFYING NEED RELATED TO A PUBLIC HEALTH EMERGENCY."

vacation, personal or medical leave time in their PTO banked hours if they choose to do so. After the 10-day elimination period, the leave is paid, again, at two-thirds of their regular pay, up to a maximum of \$200 per day, and \$10,000 aggregate.

Again, employers with fewer than 50 employees may be able to get an exemption if the cost would jeopardize the viability of the business going forward.

TAX CREDITS

Tax credits are available to employers effective April 1 to December 31. The benefit available is a refundable payroll tax credit available for paid sick leave and FMLA extension of 100%, up to the limit allowed for paid leave under the FFCRA. The payroll tax credit will include an amount attributable to employer cost for health coverage so you need to keep people on their health benefits during this time. For self-funded plans, they haven't released guidance yet as to how to calculate cost of coverage (as of the date I am writing this article) but, at this point, we assume that will likely be the COBRA rates.

The process will be a dollar-for-dollar offset against payroll taxes, and guidelines are available on the Treasury website. Tax credits are not available to government employers. There will be a 30-day non-enforcement policy issued by the Department of Labor.

EMPLOYER POSTERS FOR EMPLOYEE RIGHTS

Employers are required to post an employee rights poster in their worksites. For employers with employees working from home or elsewhere, you must also get a copy of the poster to them, either by posting it on your intranet if you have one (and letting employees working from home or elsewhere that it is posted there) or by emailing or mailing it directly to employees working at home.

The poster can be found at www.dol.gov/agencies/whd/pandemic/ffcr-poster-questions.

There is a simple one-page poster or a slightly longer, more detailed poster available. The more detailed is also available in Spanish.

HSAs AND HDHPs

If you're covered under a Health Savings Account and enrolled in a high-deductible health plan, there were questions as to whether you'd be able to receive no-cost testing and treatment for COVID-19. To answer these questions, the IRS released Notice 2020-15, which says that you are still eligible to contribute to an HSA even if your plan covers medical care services associated with testing and treatment for COVID-19 below or without a deductible.

OPTIONS AVAILABLE TO LAID-OFF OR TERMINATED EMPLOYEES

A lot of employers are asking about options available to laid-off or terminated employees. First, they should review their plan documents to see if COBRA applies. If so, they should offer COBRA.

Generally speaking, furloughs are often a short layoff, and often employers continue their benefit plans during this time. However, a layoff is a job termination, so any and all accrued leave is paid out and COBRA is offered.

It's important to note that Covered California allows for a special enrollment for loss of coverage/job within 30 days of the qualifying event. In addition, Covered California has extended its annual open enrollment through June 30. Employers may want to remind their laid-off or terminated employees that they could be eligible for subsidies under Covered California, which may make it a much more affordable option than COBRA. In some cases, some may be eligible for Medi-Cal.

HEALTH PLAN REQUIREMENTS

As any other health plan change, the employer's plan document/SPD must be amended to comply with the COVID-19 no-cost screenings. Self-funded employers will need an amendment, Summary

of Material Modifications and a Notice to Employees. Fully insured employers should check with their insurance carriers to see if they are amending their certificates of coverage. In many cases, you may still need to make an amendment to the employer wrap-around plan document.

ADDITIONAL EMPLOYEE BENEFITS ISSUES

A question I'm getting a lot from my employer clients is whether or not the information provided to an employer by an employee is subject to the protections of HIPAA. Information provided to an employer by an employee is generally not subject to HIPAA because it wasn't received, created or maintained by the health plan (for example, in a situation where an employee is self-quarantining because of exposure to the virus and she tells the employer so). The information didn't come from the health plan so technically it's not subject to HIPAA. However, if the employer uses health plan information to determine if an employee has the virus, that information *would* be subject to HIPAA. Keep in mind that even if it's not subject to HIPAA, the employer should treat the health information as sensitive personal health information and should protect it as such.

Here in California, we have a number of additional laws, including the Confidentiality of Medical Information Act, which require employers to protect any and all health information, regardless of whether it's created, received or maintained by the health plan. Therefore, employers should always treat health information as sensitive personal information and apply safeguards to protect it. Since they probably are already safeguarding HIPAA information, it makes sense to safeguard it in a similar manner.

Another question I have been asked more than once is can an employer tell employees if a coworker has COVID-19 or suspects they've been exposed? In this situation, it's clear cut: HIPAA applies, and HHS guidance says you should notify other employees

that a coworker has been exposed but the employer *should not provide the name or names or persons who have or have had COVID-19*. The employees may figure it out if only one person is absent but the employer should NOT provide names.

What should an employer do if an employee informs them that he has been exposed or tested positive for COVID-19? The employer should shut down the office/area and clean/sanitize before re-opening, identify the coworkers who may have been exposed, inform co-workers without identifying the employee and recommend they speak to a healthcare provider and self-quarantine for at least 14 days, and encourage employees to contact HR with questions and advise them that further communication is forthcoming. In these circumstances, they should definitely keep communicating with employees.

EMPLOYER CONFIRMATION/ VERIFICATION OF COVID-19 STATUS

Unfortunately, there have been reports of employees who have created false doctor notes or documents to get paid time off under FFCRA and, in some cases, those false reports cost the employer greatly in cleaning costs, shutdown costs, payment for leaves when employees were sent home to self-isolate for 14 days, and more. CNN recently reported that the FBI's Office of the Private Sector notified members of private industry that they should be on the lookout for fraudulent doctor notes and falsified documentation from employees claiming positive COVID-19 test results. Employers should make sure that the notes are on official letterhead from a medical facility, and

perhaps call the telephone number on the documents to verify the phone numbers are in fact related to such facilities. The BI recommends that supervisors should also look at inconsistencies in font and spacing, or signs that a document has been computer-edited.

FSA ELECTIONS

In another matter, it's important to note that employees may seek to stop dependent care FSA elections due to school closures, and such changes are permissible based on the change in the provider cost (the cost is \$0 when day care is closed).

SEE THE DOL WAGE AND HOUR Q&A

I mentioned the DOL Wage & Hour Questions and Answers earlier. I highly recommend that employers review those frequently, as they are being updated consistently.

THE CARES ACT—OVERVIEW

To help businesses suffering due to the coronavirus outbreak, the federal government enacted the Coronavirus Aid, Relief and Economic Security Act. This legislation was passed on March 25 and signed into law on March 27. It is designed to assist employers with fewer than 500 employees and it includes corporations, sole proprietors, independent contractors, self-employed individuals and tribal businesses. The CARES Act provides \$349 Billion in Small Business Administration loans. Many of the health plan provisions of the CARES Act state an effective date of March 18 (the effective

date of FFCRA) rather than March 25, to be consistent with FFCRA.

There are basically two types of loans (there are also more 7(a) loans, which I won't be discussing here): Economic Injury Disaster Loans and Paycheck Protection Plan loans.

The PPP, which most employers are interested in, provides up to a \$10 million cap to employers. The goal is to keep employees employed; therefore, the majority of the loan proceeds must be used for payroll and payroll-related expenses.

Employers can apply through any SBA-certified lender beginning April 3 through June 30. Lenders include banks, credit unions and other qualified SBA lenders.

To calculate how much of a loan you may qualify for, you should multiply your 2019 payroll average monthly cost (including health benefits cost) by 2.5. That is your loan amount. (For newer businesses, there are other calculations available.)

Under the CARES Act, payroll includes salary, wage, commission or similar compensation, cash tips or equivalent, payment for sick time, FMLA (exception: FFCRA leaves), vacation, group health insurance premiums, payments for retirement benefits, state or local tax. What's excluded: compensation over \$100k, payroll taxes, income taxes, compensation to employees outside of the USA, and FFCRA leave expenses (those are given a tax credit). There are special rules for seasonal employers.

Once the loan is secured, you will be required to track all of the expenses that you used the loan proceeds for over the following eight weeks. You must document and return all documentation to your lender to prove that the funds were used only for qualified expenditures.

Qualified expenditures include payroll, payroll-related benefits (like health insurance), utilities, rent or mortgage costs, and leased equipment. The payroll expenses need to be at least 75% of the loan amount. The utilities, rent, mortgage costs or leased equipment expenses must not exceed 25%

UNFORTUNATELY, THERE HAVE BEEN REPORTS OF EMPLOYEES WHO HAVE CREATED FALSE DOCTOR NOTES OR DOCUMENTS TO GET PAID TIME OFF UNDER FFCRA.

of the loan amount. Be careful with this and keep very good records.

LOAN FORGIVENESS

Under the CARES Act, the lender will forgive the qualified portion of the loan used for acceptable items (it becomes a grant you do not need to repay). However, keep in mind that this loan is all about keeping employees employed. If you reduce your employee headcount during this time, you will reduce the forgiveness in proportion to the reduction. For the portion not forgiven, the interest rate is one percent for a two-year term. There is a six-month deferment on the first payment and no prepayment penalty.

PROBLEMS WITH PPP ROLLOUT

You may have heard about the significant problems with the initial PPP rollout. The SBA did not get the guidance to the banks until approximately 1:00 a.m. on April 3 (the date of the launch) so the banks were left scrambling to complete the programming functions needed to automate the process.

Because the banks needed time to get programming completed, there was a slower-than-anticipated rollout. To deal with this, many banks were phasing in applicants by type. For example, they may have started with single-owner companies, then multiple owner companies, then 1099 contractors, etc.

Unfortunately, due to the pre-established limits set by SBA with each lender, some banks met their maximums 24 to 72 hours after the rollout and shut down the program, or put it on pause.

Most banks are requiring that you must be a business customer, which caused problems for those whose normal financial institutions were already maxed out on their loan-applications limits. In addition, the SBA system crashed on the Monday following launch.

On April 16, the federal government announced that the funds had run out. Later in the month additional funds were authorized by Congress.



UNDER THE CARES ACT, HDHPs CAN COVER TELEHEALTH SERVICES PRIOR TO THE PATIENT REACHING THE HIGH DEDUCTIBLE THROUGH DECEMBER 31.

ECONOMIC INJURY DISASTER LOANS

Economic Injury Disaster Loans include options for a \$10,000 grant. They are supposed to be easy and fast. In fact, SBA claims you will receive this grant within three business days of the application filing. It's a grant and does NOT have to be repaid. However, at the time of this writing, these funds have also reached their maximums. Again, Congress is working on additional funds so stay tuned.

You should be aware that the amount received from an EIDL grant is subtracted from the forgiveness amount of the PPP if you're applying for both. For example: If you received \$75,000 from PPP and \$10,000 from the Economic Injury Disaster Loan Grant, they will subtract the \$10,000 you

already received from the PPP loan amount. Any previous EIDL loans will be rolled into the new PPP loans.

There is an excellent U.S. Chamber of Commerce piece that was created almost immediately to educate employers on the PPP and EIDL loans: www.uschamber.com/report/guide-small-business-covid-19-emergency-loans.

CARES ACT HEALTH PROVISIONS

The CARES Act also includes some health-plan changes. It provides that all testing of COVID-19 is to be covered by private insurance plans without cost sharing for both fully insured and self-insured plans. It includes services/items provided during medical visit, including telehealth visit, urgent care, doctor's office or ER that result in testing or screening. It's effective March 18



NOT ALL 401(k) PLANS HAVE LOAN PROVISIONS. IF YOURS DOES AND YOU NEED TO ACCESS IT, YOU MAY BE ABLE TO TAKE A LOAN WITHOUT SOME OF THE PAST PENALTIES.

and extends through the end of the public health emergency. Under the CARES Act, HDHPs can cover telehealth services prior to the patient reaching the high deductible through December 31. Keep in mind that this is voluntary: If the plan covers telehealth below the deductible, employees will not lose eligibility to contribute to HSA.

There is also an inclusion of OTC medical products as qualified expenses under FSA, HDHP and HRA plans. Once again, these are voluntary; plans must be amended to cover this and claims must be substantiated. Within this provision, physician prescriptions are not required, and even menstrual products are considered qualified expenses.

In other provisions, the DOL was given the authority to postpone ERISA filing deadlines by one year in the case of a public health emergency. (Note: This is not guaranteed so check the DOL website for updates.) The CARES Act also has provisions for student loans. It allows employers to pay to an employee or lender, including principal or interest, up to \$5,250 toward an employee's qualified education loan. This is not taxable income to employees. Payments must be made before January 1, 2021 (26 U.S.C. Section 127).

CARES ACT 401(K) DISTRIBUTION AND LOAN ALLOWANCES

The CARES Act also allowed for several changes that will impact retirement income and strategies going forward. The main components include changes to required minimum distributions, 401(k) loans, Social

Security benefits, a new coronavirus-related distribution exception and charitable provisions. I will focus on the 401(k) and retirement-plan provisions in this article.

The required minimum distributions of a 401(k) plan are basically waived; you can leave your retirement accounts alone for 2020. Because the markets were volatile in early 2020 and the required minimum distributions were based on the end of 2019, before accounts saw a drop in value, this will help many retirees, as they can leave their investments alone for a year and allow them to recover from the fallen market.

401(k) loans were also impacted by the CARES Act. 401(k) plans now allow participants to borrow up to 100% of their vested account balance or \$100,000, whichever is less. These limits apply to loans made from March 27 through September 23. Keep in mind, not all 401(k) plans have loan provisions. If yours does and you need to access it, you may be able to take a loan without some of the past penalties.

Withdrawals from 401(k) and certain individual retirement accounts may also be allowed without paying an early withdrawal penalty of 10%. You can also avoid paying taxes if the withdrawn money is put back in the account within three years.

These provisions are complicated and I'm only touching on them here. Plan provisions vary, and everyone should definitely seek the advice of a 401(k) or retirement plan representative or a tax attorney before taking loans or making withdrawals, as plan

provisions vary greatly and you don't want to do more harm than good.

PPP LOANS, ROUND TWO

On April 24, President Trump signed the latest stimulus package, which offered \$484 billion in COVID-19 relief, including \$310 billion for the PPP, plus \$75 billion for hospitals, \$25 billion for coronavirus testing and an additional \$6 billion for other SBA disaster-relief funding. The SBA announced a "restart" of the PPP on April 27 at 10:30 a.m., when the banks and financial institutions literally pressed their "send" buttons to submit millions of applications for PPP loans, which of course caused the SBA system to crash once again. They did, however, get it back online quickly, and many more loans were approved in the week after.

If you were able to have your loan applications completed and ready to go at the restart date, you had a chance to qualify for the additional funds. This time, SBA and Congress put an emphasis on smaller, privately held businesses for priority loan approval, including a portion set aside for smaller financial institutions, employers with fewer than 50 employees, minority-owned and women-owned businesses, after the bad press related to the first round of PPP loans, which resulted in the majority of the funds going to publicly traded companies, large restaurant and other retailer chains, and the "best customers" of the largest financial institutions.

As of the date of this article being updated, the PPP was still active and accepting

applications, but those loans are expected to go quickly.

COBRA AND CLAIMS EXTENSIONS—EMERGENCY FINAL RULES RELEASED

On April 29, in what looks to be a direct response to NAHU’s letter dated April 7 making suggestions to the Administration on the association’s concerns that the COVID-19 outbreak may temporarily impede efforts to comply with various requirements and deadlines under ERISA, the Department of Labor released guidance that addresses many of the topics included in the letter. (For a copy of the letter, go to <https://nahu.org/media/5251/nahu-covid-19-suggestions-april-2020.pdf>.)

The DOL and Treasury released an emergency final regulation regarding the COBRA-election period during the dates of the COVID-19 national emergency. The emergency rule took effect immediately and can be applied retroactively to March 1.

The emergency rule allows more flexibility for initial COBRA-election periods, deadlines for COBRA premium payments and timelines for the employer to provide COBRA-election notices. The changes in these timelines will be in effect until the Administration declares the end of the COVID-19 national emergency.

The DOL released the EBSA Disaster Relief Notice 2020-01, which provided guidance and relief for employee benefit plans due to the COVID-19 outbreak, and the DOL’s EBSA released 29 CFR Parts 2560 and 2590 and the IRS 26 CFR Part 54, which provides for an “Extension of Certain Timeframes for Employee Benefit Plans, Participants and Beneficiaries Affected by the COVID-19 Outbreak.”

While I will not go into detail, I will highlight the most important provisions.

OVERVIEW OF THE EMERGENCY RULES

This relief provision allows all group health plans, disability and other welfare benefit

plans, and employee pension plans subject to ERISA to disregard the period from March 1 until 60 days after the announced end of the national emergency, or such other date announced by the Agencies in a future notice (called the “Outbreak Period”) in determining special enrollment periods, a COBRA continuation election period, the date for making premium payments, the date for individuals to notify the plan of a qualifying event, the date in which a benefit claim is filed, the date for filing an appeal of an adverse benefit determination, the date to file a request for an external review after an adverse benefit determination, and the date in which a claimant may file information related to a request for external review upon a finding that the request was not complete.

COBRA-ELECTION PERIOD

The emergency rule changes the COBRA-election period by allowing a person who has an election period between March 1 and the end of the national emergency an additional 60 days after the end of the national emergency to choose COBRA-continuation coverage. Prior COBRA rules provided enrollees to have 60 days to elect COBRA but this extension will allow eligible COBRA beneficiaries to have more time to make a COBRA-election-period decision during the pandemic.

Examples were provided for seven scenarios in the Federal Register dated May 4 to assist beneficiaries and administrators to understand the extensions. It is important that you understand when reading the examples that the DOL and Treasury Department are assuming for purposes of the examples that the national emergency ends on April 30 (which, of course, it did not) and the outbreak period ends on June 29 (the 60th day after the end of the national emergency). But the examples will help you to understand how the extensions work. Three of the first four examples discuss the COBRA extensions. (Example Two is re-

lated to special enrollment and is discussed in the next section.)

Example One summarizes an individual who works for an employer and participates in that employer’s group health plan. Such individual’s hours are reduced due to the national emergency, which results in an offer of COBRA coverage. This individual is provided a COBRA-election notice on April 1 so what is the deadline to elect COBRA? Under this example, the outbreak period is disregarded. The last day of his election period is 60 days after June 29, which is August 28.

Example Three relates to COBRA premium payments. On March 1, an individual was receiving COBRA continuation coverage under a group health plan. More than 45 days had passed since this person had elected COBRA. Monthly premium payments are due by the first of month and the plan only provides for the statutory 30-day grace period for making premium payments. This person made the February payment on time but did not make the March payment or any payments during the outbreak period. As of July 1, the individual had not made any premium payments for March, April, May or June. Does this person lose COBRA coverage and, if so, for which months?

For this example, the outbreak period is disregarded. Premium payments made by 30 days after June 29, which is July 29 for March, April, May or June 2020, are considered timely, so this individual would be entitled to COBRA continuation coverage for these months if he makes the payment. The payments will be considered timely if they are made within 30 days after the end of the outbreak period. Premium payments for all four months are due by July 29. The plan cannot deny coverage and may make retroactive payments as long as they are received by July 29.

Example Four relates to COBRA premium partial payment. Assume the same facts as Example Three. By July 29, the individual made a payment equal to two months’

premiums. How long does this person have coverage? Because the individual made two months' payments, he is entitled to COBRA continuation coverage for March and April, the two months for which the premium payments were made; he is NOT entitled to COBRA continuation coverage for any month after April. Therefore, any services incurred in March or April would be covered by the plan. The plan would not be obligated to cover any benefits after April 30.

SPECIAL ENROLLMENT TIMEFRAMES

In general, HIPAA requires a special enrollment period in certain circumstances, including when an employee or dependent loses eligibility for any group health plan or other health insurance coverage in which the employee or the employee's dependents were previously enrolled, including coverage under Medicaid and CHIP, and when a person becomes a dependent of an eligible employee by birth, marriage, adoption or placement for adoption. Generally, group health plans must allow such individuals to enroll in the group health plan if they are otherwise eligible and if enrollment is requested within 30 days of the occurrence of the qualified event (or within 60 days, in the case of the special enrollment rights added by the Children's Health Insurance Program Reauthorization Act of 2009).

Like the COBRA extensions, this emergency rule extends the special enrollment period for all group health plans, disability plans and other employee welfare benefit plans, and employee pension plans subject to ERISA or the Code must disregard the period from March 1 until 60 days after the announced end of the National Emergency, or such other date announced by the agencies in a future notice. Therefore, the 30-day (or 60-day in the case of certain CHIP enrollments) special enrollment period is extended until 60 days after the announced end of the National Emergency. Remember, in the examples, they are assuming that the end of the national emergency is April 30

with the outbreak period ending 60 days later on June 29.

Example Two relates to a special enrollment period. Say an individual previously declined participation in her employer-sponsored group health plan and on March 31 she gave birth and would like to enroll herself and the child into her employer's plan. However, the employer's open enrollment period does not begin until November 15. When can she exercise her special enrollment rights? In this example, the outbreak period is disregarded. The individual and her child qualify for special enrollment into her employer's health plan as early as the date of the child's birth. She can exercise her special enrollment rights for herself and her child into the plan until 30 days after June 29, which is July 29, provided that she pays the premiums for any period of coverage.

The other examples relate to the claims procedure and appeals procedure deadlines.

The main thing to remember is that regarding COBRA and special enrollment emergency provisions, the key date is 60 days after the announcement that the national emergency has ended. In terms of making retro payments, my concern is that if someone was laid off for a period of time, as months accumulate in retro status, it will be that much more difficult to pay the past-due premiums the longer the time accumulates. If you aren't able to afford month one payments, will you be able to afford months one through four (or more) and pay within the allowed time-frames? I think the intent is good, but we'll see how the reality of the financial situation plays into this. We all know how, in the past, someone could wait until the end of the old 60-day election period, elect at the end, then have 45 days to pay the premium. Employees with knowledge (or help from someone who has knowledge) of how the COBRA timeframes work could wait and see if they had claims that needed paid during that 45-day window. If no claims, no need to pay the premium. Now, with these extensions, allowing those months to accumulate

until the end of the national emergency just means that the COBRA participant will have even MORE MONTHS to make up premium payments for if they did have claims during that period. And if they were laid off or had a reduction in hours, that will not be easy.

Again, great intent, but I'm not sure if it will actually help people who lost their jobs during this time. Perhaps enrollment in exchanges (with possible subsidies) may be the way to go. The special enrollment extensions will certainly cause a bit of chaos for HR departments to attempt to calculate, and that could cause some issues as well.

MODEL COBRA NOTICES

The Department of Labor released new model notices for COBRA on May 1, including a model general notice and election notice, available in both English and Spanish, as well as a new COBRA FAQ. Those notices can be found at www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra. For More Information

This information is current as of May 4 but you should frequently check www.cahu.org and www.nahu.org for more information and updates. 📄

Disclaimer: This information has been gathered from public sources and should not be used as legal or tax advice. You should seek advice from your legal counsel as situations vary and because this information is constantly being changed and updated.



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